

1 STATE OF NEW YORK

2 COUNTY OF MONROE SUPREME COURT

3 -----x

4 THE PEOPLE OF THE STATE OF NEW YORK, : IND # 2013-0954

5 -vs- :

6 ANTHONY MILLER, : JURY TRIAL

7 Defendant. :

8 -----x

9 Hall of Justice  
10 Rochester, New York 14614  
September 9, 2014

11 B E F O R E:

12 HONORABLE THOMAS E. MORAN,

13 Supreme Court Justice

14 A P P E A R A N C E S:

15 SANDRA DOORLEY, ESQ.  
16 District Attorney - County of Monroe  
17 47 South Fitzhugh Street  
Rochester, New York 14614  
18 Appearing for the People of the State of New York  
By: MICHAEL HARRIGAN, ESQ.  
Assistant District Attorney

19 TIMOTHY P. DONAHER, ESQ.  
20 Public Defender - County of Monroe  
10 North Fitzhugh Street  
21 Rochester, New York 14614  
Attorneys for the Defendant  
22 By: JOSHUA STUBBE, ESQ.  
Assistant Public Defender

23 ANTHONY MILLER  
24 Defendant

25 CAROL P. RAES, C.S.R.  
Senior Court Reporter

1 THE COURT: You are Anthony Miller?

2 THE DEFENDANT: Yes.

3 THE COURT: You appear here today with your  
4 attorney, Mr. Stubbe, is that correct?

5 THE DEFENDANT: Yes.

6 THE COURT: Mr. Harrigan for the People.  
7 We're here for the purposes of a jury trial; however,  
8 before we begin, there are two things I want to deal  
9 with. One is the sidebar waiver.

10 Mr. Miller, we talked briefly last week about  
11 whether you wanted to come up to the bench on those  
12 occasions when I call the lawyers to the bench or when we  
13 have a bench conference. The reason for those is usually  
14 scheduling; more importantly, to talk about pieces of  
15 evidence which may or may not get admitted ultimately.

16 THE DEFENDANT: Right.

17 THE COURT: Obviously, the more people we have  
18 up here, the louder we have to be, the greater the  
19 likelihood the jury can hear all of those things. I'm  
20 positive, because I know Mr. Stubbe pretty well, that the  
21 minute he gets away from this bench and sits back down,  
22 if you're there, he's going to tell you exactly what went  
23 on. But you have an absolute right to come to the bench  
24 if you want. You can waive coming up to the bench if you  
25 want. It's totally up to you.

1 THE DEFENDANT: Okay.

2 THE COURT: In addition to that, even if you  
3 decide to sign the form that says you waive coming up, if  
4 you change your mind at any time, you're more than  
5 welcome to do so.

6 THE DEFENDANT: Okay.

7 THE COURT: Okay?

8 THE DEFENDANT: Yes.

9 THE COURT: Have you had a conversation with  
10 Mr. Stubbe about coming up to sidebars?

11 THE DEFENDANT: Yes, I have.

12 THE COURT: Would you like to waive coming up  
13 at this point?

14 THE DEFENDANT: Yes, I am.

15 THE COURT: If you would be so kind as to sign  
16 the form. Nobody pressured you to waive this right, did  
17 they?

18 THE DEFENDANT: No.

19 THE COURT: You're doing it knowingly,  
20 intelligently, and voluntarily after having an  
21 opportunity to speak to Mr. Stubbe?

22 THE DEFENDANT: Yes.

23 THE COURT: Thank you, Mr. Miller. If you  
24 could mark that, we will mark that part of the court  
25 exhibits.

1 (COURT EXHIBIT 1 WAS MARKED FOR IDENTIFICATION.)

2 THE COURT: Now, Mr. Stubbe, I received a  
3 motion yesterday from you. Would you like to articulate  
4 that on the record, please?

5 MR. STUBBE: Judge, I would. I'd actually  
6 like to amplify based upon some information that I  
7 received from Mr. Harrigan just today. I don't know when  
8 he sent the e-mail, to be fair to him. I didn't get it  
9 until this morning. I received a PDF that's an  
10 Investigative Action Report from Officer Nolan Wengert,  
11 which states, in sum and substance, that days after this  
12 alleged robbery happened, he contacted the victim and the  
13 victim -- or the victim contacted him, and the victim  
14 gave him the serial number and his Apple ID so that he  
15 could use the Find My iPhone, I believe, app to see if  
16 the phone was still active, and they found that that  
17 phone was still active two days after this robbery in an  
18 area near Genesee and West High Terrace.

19 Now, at that time, Mr. Miller was verifiably  
20 in the Monroe County Jail. When Investigator Wengert  
21 activated the phone--you can set it. It makes the phone  
22 ring or an alarm goes off--a group of approximately 30  
23 people, he states, were there, and even though there were  
24 uniformed officers in the area, the alarm went off, the  
25 people dispersed. He wasn't able to get any further

1 information. I feel like -- and I again just received  
2 this today even though it's, I think, pretty clearly  
3 Rosario, was a document created for Mr. Wengert. He did  
4 testify at the Wade hearing that we had. I believe it's  
5 also Brady information that I should have been provided  
6 with immediately. I believe that I would be ineffective  
7 in not taking a look at the Apple records or the Find My  
8 iPhone records or having contact with the provider of the  
9 phone to see if we could use cell tower triangulation to  
10 try to get a better idea where this phone was, at least  
11 during the two days after my client was in jail that the  
12 phone was being used. I don't know if it was used  
13 afterward, but my receipt of this in the last minute is  
14 something I certainly would have put in my written motion  
15 to address, my written motion, a little more fully. The  
16 reason I asked for --

17 THE COURT: Let's be clear. The motion you  
18 submitted yesterday is a motion for adjournment of the  
19 trial based upon different information than you just put  
20 on the record. If you would articulate that at this  
21 juncture, I'd appreciate it.

22 MR. STUBBE: Correct. It was a motion  
23 basically saying that about a week ago, Investigator --  
24 Officer Daryl Pierson, RPD Officer Daryl Pierson, was  
25 shot and killed, and that since that time, doing a quick

1 search on the Democrat & Chronicle, I found that there  
2 are, I believe, 23 articles and counting about that.  
3 There are too many to note, but hundreds, if not  
4 thousands of comments on those articles.

5 The tenor of the community right now, I feel,  
6 is so pro police and/or sympathetic to the police that a  
7 defense where I'm functionally saying that the officers  
8 didn't do a good job or possibly withheld evidence, I  
9 believe, would go over like a lead balloon these days,  
10 and I don't believe that Mr. Miller right now could get a  
11 fair trial in this community. I believe -- it's  
12 obviously his constitutional right to have that, and that  
13 this interceding event has destroyed his ability to do  
14 that.

15 I believe what also tends -- or I would think  
16 tends to have you decide toward an adjournment is that  
17 the district attorney asked for an adjournment on this  
18 case simply due to Investigator Wengert's unavailability,  
19 for training purposes. I don't know if we ever went over  
20 whether his training was scheduled before or after this  
21 trial date, but you set the trial date many, many months  
22 before our original June trial date. And based upon  
23 that -- that's certainly a reason to adjourn the case,  
24 but I don't believe it's nearly as compelling a reason as  
25 a fair trial for a defendant.



1                   Based upon all of those factors, and I think  
2                   possibly even moreso based upon this late turnover of  
3                   this evidence -- and I'm not saying this is Mr. Harrigan.  
4                   I'm fairly certain Mr. Harrigan will tell you he just  
5                   received this from Investigator Wengert, but based upon  
6                   all of those factors, I believe we are entitled to an  
7                   adjournment.

8                   Finally, my client is out of custody, so it's  
9                   not prolonging any sort of pretrial custody that might be  
10                  a consideration for the Court, and I don't believe I put  
11                  that in my papers.

12                  THE COURT: I think you did. With respect to  
13                  the new information as it relates to the cell phone, did  
14                  I hear you correctly that you would be in a position to  
15                  want to subpoena the provider for the purposes of looking  
16                  at the records of the phone?

17                  MR. STUBBE: Correct.

18                  THE COURT: Do you have the records of the  
19                  phone?

20                  MR. HARRIGAN: I have the records of the phone  
21                  for phone call purposes. I don't have any pings or --  
22                  there was no -- no warrant or no subpoena for any  
23                  triangulation or any of that. I can provide -- I didn't  
24                  intend on -- in my mind, the phone records don't really  
25                  tell me anything. The phone was turned off right after

1 and that --

2 THE COURT: So there's no phone calls after  
3 the time of the alleged theft?

4 MR. HARRIGAN: Just, your Honor -- while I'm  
5 looking for that, I can tell the Court that with regard  
6 to that document, I met with Investigator Wengert at  
7 approximately 4:30 yesterday, 4:30 p.m. After our  
8 meeting, that's when I e-mailed it to Mr. Stubbe. That's  
9 the first time I've seen that document or was aware of  
10 that document. I told Investigator Wengert that. He  
11 recalled providing that to me at grand jury. I was at  
12 grand jury with Investigator Wengert. I've searched my  
13 files. I've searched every piece of paper. I don't have  
14 an independent recollection of that, and I don't have  
15 that in my file.

16 THE COURT: Mr. Harrigan, just to be clear, I  
17 will subscribe no ill intent on your part because I know  
18 better. You are not of that vein. If you had it, I'm  
19 sure you would have turned it over. However, the police  
20 are your responsibility, and the failure to turn that  
21 over is, I think, fairly problematic. Here's what I'm  
22 thinking: If we don't have the records -- I'm trying to  
23 figure out whether there would be records that even  
24 existed that would give locations of the phone if it was  
25 turned off, and I don't think so.



1 MR. STUBBE: Judge, I can -- having subpoenaed  
2 and done a lot of work in this area, it would not.  
3 However, it's clear that on September 27th, the phone was  
4 on or else this Find My iPhone app, assuming that's what  
5 he used, would not work, and the fact that it did work  
6 indicates that the phone was, at least on on the 27th.  
7 When a phone is on, it's being tracked at all times.  
8 This is an Apple iPhone. They're being tracked at all  
9 times. The provider doesn't routinely give out that  
10 information, but they certainly will based upon a  
11 judicial subpoena, so for any time it was on during those  
12 days, I think it's very --

13 THE COURT: Are there any calls after the time  
14 of the theft?

15 MR. HARRIGAN: Your Honor, I do have records.  
16 I believe they're from the victim. I'm not able to  
17 confirm that. I don't have all my paperwork here with  
18 me, and there are calls, actually September 25,  
19 September 26, September 27, and ends on September 27th.  
20 The reason why I say I don't know if it's the victim's,  
21 it's under a completely different name and a different  
22 address.

23 THE COURT: But it's the right phone number.

24 MR. HARRIGAN: I believe it is. I believe it  
25 is. I can't recall for certain without seeing -- It is,

1 your Honor. Mr. Stubbe just showed me the phone number.

2 MR. STUBBE: Judge, I obviously state that's  
3 Brady, also.

4 THE COURT: Mr. Harrigan, we're not having a  
5 trial. Normally, I could give a short adjournment. I  
6 know we're only going to pick a jury today and then  
7 tomorrow morning we're not going to be in session, but I  
8 don't -- if it was just the review of the records that  
9 you needed to see, we'd just do the adjournment. What  
10 you're going to do is backtrack on those phone numbers  
11 and go find out who had the phone, right?

12 MR. STUBBE: Correct.

13 THE COURT: That can't get done between today  
14 and tomorrow.

15 MR. STUBBE: I'll have a subpoena to you by  
16 the end of business today because I know these phone  
17 companies won't do it based upon my signature.

18 THE COURT: It sounds like Mr. Harrigan has in  
19 his possession the phone records which would show  
20 outgoing and incoming. If that's the case, I would  
21 assume you're going to be looking for who was called and  
22 who called that phone.

23 MR. STUBBE: Correct, and also, I will be  
24 subpoenaing the -- if they have them -- either the GPS  
25 record or the cell tower ping records.

1 THE COURT: Mr. Harrigan, can I see those real  
2 quick?

3 MR. HARRIGAN: You can, your Honor. Let me  
4 make a -- I made a notation to myself. I've talked to  
5 the victim. He transferred his number to actually  
6 another phone, so I'm not sure this is the actual --  
7 because obviously, it doesn't mean just because you have  
8 a number, you can transfer it to another phone. I made  
9 that note, so I'm not even confident this is from that  
10 phone because I know I made that note for a reason.

11 THE COURT: He changed his number?

12 MR. HARRIGAN: No, he told me he transferred  
13 his number to another phone, so he had the same number  
14 but he used another phone, so those records are for that  
15 number, not that phone.

16 THE COURT: Do we know when he changed it?

17 MR. HARRIGAN: I'm not sure of that, your  
18 Honor. I know it was --

19 THE COURT: Can you call him?

20 MR. HARRIGAN: I can call him, yes.

21 THE COURT: Let's find out. If he changed --  
22 if he assigned a different phone to that number within 20  
23 minutes of the theft, it's a whole different story.

24 MR. STUBBE: Maybe, Judge, but those records  
25 go through the 27th. I don't know when they stop and if

1 the 27th is actually the day they stop altogether.

2 THE COURT: To get the Find The iPhone, don't  
3 you have to dial the number?

4 MR. STUBBE: No, you have to have the --

5 THE COURT: Serial number?

6 MR. STUBBE: I believe the serial number. You  
7 have to have the Apple ID and a password is all I believe  
8 you need. I think once you plug those in, then it uses  
9 the Apple ID to identify all devices that are synced, for  
10 lack of a better word, to that account.

11 THE COURT: Okay.

12 MR. HARRIGAN: I can just tell the Court that  
13 this subpoena I requested from September 25, 2013 to  
14 present, it was faxed on September 27th, so that's what  
15 the records are for. So anything after that, I don't  
16 have. I wouldn't know.

17 MR. STUBBE: Judge, simply the records would  
18 be -- all I'm looking for, even if he did transfer the  
19 phone records -- or the phone number, certainly would be  
20 a reasonable thing to do. That doesn't mean that they  
21 still wouldn't be able to track the phone through a GPS  
22 or cell tower triangulation. Additionally, I don't know  
23 how it would exactly work that if he transferred the  
24 number to another phone, how the Find My iPhone --  
25 doesn't actually say "Find My iPhone" on the paperwork.

1 I know it is a common investigative tool that the police  
2 officers use. I don't know how that also wouldn't be  
3 transferred to a different phone as opposed to staying on  
4 the old one, but these are, obviously, things I would  
5 have looked into had I had that paperwork.

6 MR. HARRIGAN: I can tell the Court I have  
7 inquired throughout this case from Investigator Wengert  
8 why there wasn't any pinging on the phone or some type of  
9 investigative technique such as that. His answer to me  
10 was the phone was turned off, but then I did receive that  
11 yesterday, so the entire time, I had -- my impression was  
12 the phone was off, nothing came back, so there was no use  
13 to try to get the pinging records. Then I received that  
14 yesterday.

15 THE COURT: Can you call Wengert?

16 MR. HARRIGAN: I can.

17 THE COURT: Can you just call him for me?

18 MR. HARRIGAN: Yes.

19 THE COURT: Call him. See where he is.

20 MR. HARRIGAN: Okay.

21 THE COURT: If he's close, let's have a visit.

22 MR. HARRIGAN: My guess is he's not close.

23 THE COURT: Here's what I need to know: I  
24 need to know when the alleged victim transferred the  
25 number to another phone because Wengert keeps saying that

1 the phone was turned off, and I don't know if he means it  
2 was switched to another device, the number was switched  
3 to another device. We're still left with the ultimate  
4 issue of whether --

5 MR. STUBBE: Judge --

6 THE COURT: But you ping a number.

7 MR. STUBBE: No, you ping an ID. You ping a  
8 serial number, I guess, not a phone number.

9 THE COURT: If you don't have a provider, if  
10 he takes the phone and -- all you have left is a handheld  
11 laptop in essence, right?

12 MR. STUBBE: With a GPS locator. They also  
13 still have cell service because every phone ever made can  
14 dial 911. I believe that even in an inactive or  
15 unactivated phone, you can still use it on WiFi. That  
16 would still be transmitting the serial number. I think  
17 it's an ESIN number.

18 THE COURT: Mr. Harrigan, here's the problem.

19 MR. HARRIGAN: Yes, your Honor.

20 THE COURT: I don't think we know enough. I  
21 can't make a decision of this magnitude without having  
22 actual knowledge of exactly what's going on, and if I  
23 knew more about how the phone systems worked or any of  
24 that, I'd be in a different position, but I think I have  
25 to give Mr. Stubbe and Mr. Miller the opportunity to do



1 some digging.

2 MR. HARRIGAN: I apologize to the Court and  
3 counsel.

4 THE COURT: Mr. Harrigan, forgive me for this.  
5 Two things: Number one, I'm not blaming you because  
6 you're a stand-up, honest, forthright guy. I don't have  
7 any doubt about that. Number two, as a matter of policy,  
8 these things crop up way too many times. You know, I was  
9 in your position for many, many years, and I know stuff  
10 happens, but you know what I used to say? If you wrote  
11 it down, even a plate number, stick it in the xerox  
12 machine, make a copy of it and send it to us. We're just  
13 a little lax on Rosario, and in this case, he has an  
14 argument that it's Brady. It's a little stretch, but  
15 Rosario, clearly.

16 MR. HARRIGAN: And, your Honor, it's not -- I  
17 offer something not as trying to put blame on someone  
18 else or excuse the conduct, but usually, that is what I  
19 do before a hearing. Unfortunately, I did not conduct  
20 the hearing in this case, so it was --

21 THE COURT: Again, I think Mr. Stubbe would  
22 agree with me --

23 MR. STUBBE: I do.

24 THE COURT: -- that you're not one of the guys  
25 we worry about.

1 MR. HARRIGAN: Thank you.

2 THE COURT: But I can't have the trial, and  
3 you gotta get me a subpoena because a short adjournment  
4 won't resolve the issues that are outstanding. Let's see  
5 what I can do here. This is going to be awhile. What  
6 are the chances you guys are free on the 14th of October?

7 MR. HARRIGAN: I am free.

8 MR. STUBBE: I am, too, Judge.

9 THE COURT: Wow.

10 MR. STUBBE: How did we not talk about that  
11 date yesterday? That was for a brand new case.

12 THE COURT: I'm going to put you in as number  
13 two -- actually, number three. The first two -- I'm  
14 pretty sure the first two are going to settle after what  
15 I learned yesterday, so if we can put this down for  
16 October 14th, that should give you enough time to get  
17 your subpoenaed materials back and review those.

18 THE CLERK: So that is at 2 o'clock?

19 THE COURT: 10/14.

20 THE CLERK: The holiday is on the 13th.  
21 Fourteenth.

22 THE COURT: What would I do without you? It  
23 will be 2 o'clock. Didn't have to chime in quite so  
24 quickly. So Mr. Curran, if you'd tell the Commissioner  
25 we can't do anything today.

1 THE CLERK: I shall.

2 THE COURT: Mr. Miller, Mr. Stubbe, Mr.  
3 Harrigan, we are set now for October 14th at 2 o'clock in  
4 the afternoon for trial.

5 Mr. Miller, I've told you this before, but I'm  
6 going to repeat it, simply because I have to. You have a  
7 duty and obligation to be here each and every time I  
8 direct. If you fail to show up, matters are going to  
9 take place in your absence. Right now, you are scheduled  
10 for a new trial date of October 14 at 2 o'clock in the  
11 afternoon. If you fail to show up on that day, trial  
12 will go on in your absence. Do you understand?

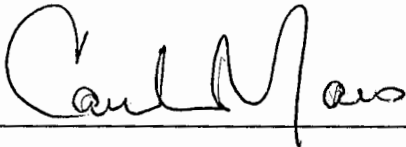
13 THE DEFENDANT: Yes.

14 THE COURT: All right. Thank you.

15 THE DEFENDANT: Thank you.

16 (Proceedings concluded.)  
17

18 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT

19   
20 \_\_\_\_\_

21 CAROL P. RAES, C.S.R., Senior Court Reporter  
22  
23  
24  
25